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The Honorable Mac Warner
Secretary of State
West Virginia Capitol Complex
Bldg. 1, Suite 157K
Charleston, WV 25305

Dear Secretary Warner:

You have asked for the Opinion of the Attorney General regarding the filing deadline for unaffiliated or minor party candidates who wish to appear on the general election ballot. This Opinion is being issued pursuant to West Virginia Code § 5-3-1, which provides that the Attorney General shall "give written opinions and advice upon questions of law . . . whenever required to do so, in writing, by . . . the secretary of state . . . ." To the extent this Opinion relies on facts, it is based solely upon the factual assertions set forth in your correspondence with the Office of the Attorney General.

In your letter, you ask about your obligations in enforcing the filing requirements in West Virginia Code § 3-5-7 against unaffiliated or minor party candidates. That statutory provision requires candidates for elected office to file a certificate with the Secretary of State announcing their candidacy ("certificate of announcement") no later than the last Saturday in January before the date of a primary election. The plain language does not set forth whether this requirement applies to all candidates or only major party candidates. But you further note that two subsequent code provisions provide that "groups of citizens having no party organization may nominate candidates who are not already candidates in the primary election" by filing a certificate of nomination "no[] later than August 1 preceding the November general election." W. Va. Code §§ 3-5-23, 24.

Two recent court decisions—one from the Supreme Court of Appeals and another from the United States District Court for the Southern District of West Virginia (the "Southern District")—have weighed in on your obligations under Section 3-5-7. In *Wells v. State ex rel. Miller*, 237 W. Va. 731, 791 S.E.2d 361 (2016), the Supreme Court of Appeals held that the certificate of announcement requirement (and its January deadline) applies to all candidates, including minor party and unaffiliated candidates. But approximately one month after *Wells* was

decided, the Southern District determined that the January deadline was unconstitutional as applied to minor party and unaffiliated candidates under the First and Fourteenth Amendments to the United States Constitution, and it permanently enjoined your predecessor, in her official capacity as the Secretary of State, from enforcing the certificate of announcement requirement in those contexts. *Daly v. Tennant*, 216 F. Supp. 3d 699, 707 (S.D. W. Va. 2016).

Your letter raises the following legal question:

*Whether* Daly v. Tennant *overrules* Wells v. State ex rel. Miller *with respect to filing deadlines for unaffiliated or minor party candidates*.

For the reasons set forth below, we answer your specific question in the negative: the Southern District in *Daly* did not "overrule" the Supreme Court of Appeals in *Wells*, but rather answered a federal constitutional question not answered in *Wells*. As we further explain, however, the practical import of *Daly* is a narrowing of the broad holding in *Wells* that all candidates must file a certificate of announcement by the January deadline. We believe the permanent injunction issued by the federal court in *Daly* would be enforced against the Secretary in both federal and state court, and it therefore precludes him or her from enforcing the January certificate of announcement requirement and deadline against any minor-party or unaffiliated candidate. The Secretary may continue to enforce the January deadline for major-party candidates and may continue to enforce the August 1 certificate of nomination requirement as to all other candidates for elected office.[1]

## ***Discussion***

### **I.**

The answer to your specific legal question is "no." The decision of the Southern District in *Daly* did not "overrule" that of the Supreme Court of Appeals in *Wells* because they answered different questions. As discussed in more detail below, the Supreme Court of Appeals interpreted the text of Section 3-5-7 and rejected one constitutional challenge to the certificate of announcement requirement. The Southern District then accepted the holdings of the *Wells* court, but deemed a separate constitutional challenge not addressed in *Wells* to be meritorious. It was on this separate ground—never addressed by the Supreme Court of Appeals—that the Southern District held the certificate of announcement requirement unconstitutional as applied to minor-party and unaffiliated candidates.

[1] Major parties or "recognized political part[ies]"refer to parties that have official ballot access, which currently are the Republican, Democrat, Mountain, and Libertarian parties. *See Wells*, 237 W. Va. 731, 741, n. 13, 791 S.E.2d at 371 n.13; *see also* W. Va. Code § 3-1-8 ("Any affiliation of voters representing any principle or organization which, at the last preceding general election, polled for its candidate for governor at least one percent of the total number of votes cast for all candidates for that office in the state, shall be a political party, within the meaning and for the purpose of this chapter . . . .").

Turning first to *Wells*, the question answered by the Supreme Court of Appeals was primarily one of statutory interpretation, namely, does the plain text of Section 3-5-7 apply the certificate of announcement requirement only to major-party candidates or also to unaffiliated and minor-party candidates? Interpreting the plain language, which applied to "[a]ny person," the court held that all candidates, including unaffiliated and minor-party candidates, must file a certificate of announcement by the January deadline. *See Wells*, 237 W. Va. at 737-38, 791 S.E.2d at 367-68.

The Supreme Court of Appeals rejected a constitutional challenge based solely on "ballot access." The petitioner in *Wells*, an unaffiliated candidate, argued that if the statute was read to require him to file a certificate of announcement, that requirement was unconstitutional. The Supreme Court of Appeals rejected petitioner's general assertion that the State had no compelling interest in imposing limitations on ballot access like a certificate of announcement requirement. *See id.* at 746-47, 791 S.E.2d at 375-76. The court stressed, however, that the petitioner did not raise "constitutional challenges to any *specific* provision of our State's election code," and "fail[ed] to advance the argument that the January deadline set forth in [the Code] creates a burden that falls unequally to a [minor party or unaffiliated candidate] seeking ballot access." *Id.* at 746, 791 S.E.2d at 376. The petitioner also "did not assert that the substantive requirements imposed by [the Code] impose any particular burden on those candidates." *Id.*

A month after *Wells*, in *Daly*, the Southern District entertained a follow-on challenge raising a federal constitutional challenge that was neither raised nor addressed in *Wells*. The *Daly* court accepted as given the statutory holding in *Wells* that the text of the West Virginia Code requires third-party and unaffiliated candidates to file a certificate of announcement. *See Daly*, 216 F. Supp. 3d at 703. This was undoubtedly appropriate, as a state court of last resort is, with rare exceptions, the final and authoritative expositor of the meaning of a state statute. *See, e.g.*, *West v. Am. Tel. & Tel. Co.*, 311 U.S. 223, 236 (1940). The Southern District then proceeded to entertain the federal constitutional challenge that the Supreme Court of Appeals had expressly reserved in *Wells*. This too was appropriate, as the Supremacy Clause of the United States Constitution allows a federal court to declare state statutes that directly conflict with the tenets of that document unconstitutional. *See PLIVA, Inc. v. Mensing*, 564 U.S. 604, 617 (2011).

Taking up the question that the petitioner failed to advance in *Wells*, the Southern District enjoined the Secretary from enforcing certain applications of Section 3-5-7. The court held that the January certificate of announcement deadline "unmistakably places a substantial burden on and discriminates against those candidates and voters 'whose political preferences lie outside the existing political parties.'" *Daly*, 216 F. Supp. 3d at 706 (internal citation omitted). In other words, the requirement was an unconstitutional burden on the rights of independent and third party candidates to place their names on the ballot. *See id.* at 707-08. On January 24, 2017, with consent of the parties, the Southern District issued a permanent injunction which expressly precluded the Secretary from "enforcing the filing deadline set out in West Virginia Code § 3-5-7(c) against independent and minor party candidates whose nomination is governed by West Virginia Code § 3-5-23(a) (2015)."

Based on this review, we believe that the Secretary can comfortably follow the letter and spirit of both decisions by complying with the express terms of the federal injunction. Though it

is true as a practical matter that the federal district court in *Daly* has enjoined the Secretary from enforcing deadlines that the Supreme Court of Appeals held in *Wells* to apply as a matter of statutory interpretation, the Southern District did not technically "overrule" *Wells*. The Southern District accepted as controlling the statutory interpretation adopted by the Supreme Court of Appeals, but found that interpretation to be unconstitutional in certain applications based on a federal constitutional question expressly reserved in *Wells*.

**II.**

Perhaps the more significant question is whether the Supreme Court of Appeals would enforce the federal injunction against the Secretary. Consider, for example, a candidate from a major party suing the Secretary in state court to prevent a minor-party candidate who did not file a certificate of announcement from appearing on the ballot. Could the Supreme Court of Appeals conclude as a matter of first impression that *Daly* was wrong and that the certificate of announcement deadlines do *not* discriminate against or place a substantial burden on minor-party and unaffiliated candidates under the First and Fourteenth Amendments? And if so, would the Supreme Court of Appeals nevertheless enforce the federal injunction?

We believe that under settled United States Supreme Court precedent, the Supreme Court of Appeals would enforce the *Daly* injunction, even if the West Virginia high court disagreed with the Southern District's legal reasoning. A state court of last resort is not bound to adopt the analysis of a federal district court as to whether the United States Constitution invalidated a state law. *See, e.g.*, *U. S. ex rel. Lawrence v. Woods*, 432 F.2d 1072, 1076 (7th Cir. 1970) ("[B]ecause lower federal courts exercise no appellate jurisdiction over state tribunals, decisions of lower federal courts are not conclusive on state courts"). But in the hypothetical lawsuit described above, the petitioner would not merely be asking the Supreme Court of Appeals to adopt a different rule of law than a federal district court. Instead, the petitioner would be asking the state high court to ignore a federal judgment and permanent injunction that expressly prohibits the opposing party (the Secretary) from awarding the petitioner the relief that he or she seeks. In that circumstance, the United States Supreme Court has instructed state courts to give full force and effect to applicable federal judgments—which here would require enforcing the federal injunction against the Secretary according to its terms.

The United States Supreme Court has derived from a variety of provisions of the Constitution an implied power for the Court to determine the effect that federal judgments merit in state tribunals. The Court has reasoned, for example, that "[p]rovisions declaring the supremacy of the Constitution and the extent of the judicial power and authorizing necessary and proper legislation to make the grants effective confer jurisdiction upon this Court to determine the effect to be given decrees of a court of the United States in state courts." *Stoll v. Gottlieb*, 305 U.S. 165, 167 (1938); *see also Embry v. Palmer*, 107 U.S. 3, 9 (1883) (similar). Whatever the precise source of its authority, the Supreme Court has consistently applied a rule in which "the judgments of the courts of the United States . . . [are] recognized as upon the same footing, so far as concerns the obligation created by them, with domestic judgments of the states, wherever rendered and wherever sought to be enforced." *Id.*; *see also Dupasseur v. Rochereau*, 88 U.S. (21 Wall.) 130 (1874); *Metcalf v. Watertown*, 153 U.S. 671 (1894); *Gottlieb*, 305 U.S. at 167.

Following this line of cases, state courts have recognized that "[t]he judgments of the federal courts are owed their due force and full effect in state courts." *In re Stevenson*, 615 Pa. 50, 67 (2012) (citing *Embry*, 107 U.S. at 10). In a relatively recent and closely analogous case, a federal district court permanently enjoined a residency requirement in a Pennsylvania election-law statute on the basis that it violated citizens' rights to political expression and association under the First and Fourteenth Amendments. *See id.* at 65. In subsequent litigation in state court, the Supreme Court of Pennsylvania noted that it was not bound by the reasoning of the federal district court on the application of the United States Constitution to state law. *See id.* at 66. Nonetheless, the state court did not consider itself free to revisit the federal decision in that case because "the permanent injunction imposed by the unappealed [federal] decision cannot be evaded." *Id.* at 72. Citing *Embry*, the court reasoned that "core concerns of federalism, comity, and practicality," as well as "awareness and consideration of the preclusive effect of a final federal judgment, to which [Pennsylvania] was a party," demanded that the court accord full faith and credit to the federal injunction. *Id.* at 66.

As the Supreme Court of Pennsylvania recognized, the requirement that state courts honor federal judgments reflects practical concerns, as well. In the hypothetical case discussed above, if the Supreme Court of Appeals ordered the Secretary to remove minor-party candidates from the ballot who did not file a certificate of announcement, the Secretary would be subject to conflicting commands from state and federal courts. The Secretary could not simply ignore the federal mandate, as "[a] person or entity subject to a judicial decree or injunction . . . must comply with that decree or injunction, notwithstanding its possible unlawfulness." *Belk v. Charlotte-Mecklenburg Bd. of Educ.*, 269 F.3d 305, 399 (4th Cir. 2001). Nor could the state court simply lift the federal injunction, because "where the judgment or decree of the Federal court determines a [federal] right . . . that decision is final until reversed in an appellate court, or modified or set aside in the court of its rendition." *Gottlieb*, 305 U.S. at 170 (internal quotation marks omitted). In part to avoid these practical difficulties that would arise from subjecting the same party to the potential for inconsistent judgments, "the Supreme Court of the United States has long assumed that state tribunals must give federal judgments the same force that federal courts give them." *Matter of Cook*, 49 F.3d 263, 266 (7th Cir. 1995) (collecting authorities).

## ***Conclusion***

In short, we believe the Secretary may not enforce the certificate of announcement deadline or requirement under West Virginia Code § 3-5-7 against any minor-party or unaffiliated candidate. Though the federal district court in *Daly* did not overrule the decision of the Supreme Court of Appeals in *Wells*, the permanent injunction issued in *Daly* has the practical effect of limiting the broad holding of *Wells*. The Secretary is enjoined from requiring that minor-party and unaffiliated candidates comply with the certificate of announcement deadlines and requirements interpreted in *Wells*, and we believe that injunction would be enforced against the Secretary in any future litigation in either federal or state court. The Secretary may, however, continue to enforce the January deadline for major-party candidates and may continue to enforce the August 1 certificate of nomination requirement in West Virginia Code §§ 3-5-23, 24 with respect to all other candidates for elected office.

Sincerely,

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